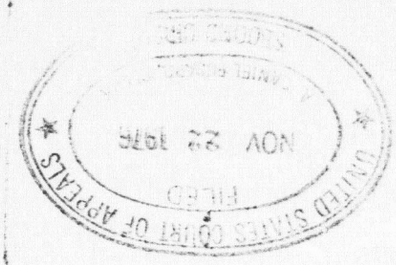
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT



76-2133

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS PULVER, Petitioner-Appellant, -against- JOHN CUNNINGHAM, Warden, New York City Correctional Institution for Men, Respondent-Appellee.	No. 76-2133

B
P/s

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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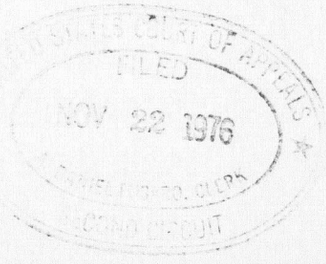

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BRIEF FOR APPELLANT

Questions Presented

1. Was the District Court correct in deciding that the opportunity for a full and fair hearing criteria, established by the Supreme Court, was fulfilled in this action?

2. Was the appellant's Fourth Amendment Rights violated by the admission at his state court trial of evidence obtained as a result of an illegal police action?

3. Was the appellant arrested without probable

cause, in violation of his constitutional rights, prior to the seizure of items that were therefore wrongfully admitted into evidence at his trial?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Ward, J.), dated September 21, 1976, denying appellant's application for a writ of habeas corpus.

Facts

On October 29, 1970 a hearing was held in the Supreme Court of the State of New York, Trial Term, before the Honorable Nathaniel Helman. The purpose of the hearing was to determine the admissibility of evidence in the pending criminal action against Thomas Pulver--appellant. After an evidentiary hearing, Judge Helman found as a matter of fact that the evidence was voluntarily abandoned by appellant (M-93)*. The abandoned items were boxes containing allegedly stolen adding machines. They had been thrown from appellant's window prior to his arrest, and were then seized by the arresting officers.

However, when Judge Helman made this factual finding, he was unaware of a crucial fact. He was unaware of it because the police detective witnesses did not reveal it during the suppression hearing. At the suppression hearing they testified to the arrest. They admitted knocking upon appellant's

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*Transcript of the N.Y. Supreme Court Suppression Hearing (hereinafter referred to as M).

door at a point in time at which they did not have probable course to arrest. But their testimony as to subsequent events was limited to a recitation of the fact that appellant closed his door after opening it in response to their knocking and that they then saw boxes being thrown from the apartment window (M. 8, 59). Omitted was a significant act of the officers, committed before the boxes were ejected from the window.

At the April 23-26, 1976 trial, this act was revealed for the first time. In response to questions from the prosecutor, New York City Police Detectives Jacobs and Schumacher admitted attempting to forcibly open the door to appellant's apartment before the boxes were discarded. The attempt was made by hitting the apartment door "with force" (T. 87-8; 166-7)*, when appellant started to close it. Appellant did not simply close the door -- the testimony at the suppression hearing -- he had to overcome the officers' use of force.

After this fact was revealed, trial counsel moved to reopen the suppression issue (T.322). Although the record is unclear as to whether the motion was granted, it is certain that Judge Backer refused to suppress the evidence (T. 323).

The Judge made no findings of fact, nor conclusions of law. Some indication of his thinking may be revealed by the Colloqui preceding his decision:

> "The Court: You renewed it. I have nothing to do with it. How can I rule on a motion that I have never heard?

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*Transcript of the New York Supreme Court Trial, hereinafter referred to as T).

"Mr. Hocheiser: You heard all the evidence in the case.

"The Court: I didn't hear anything about any search and seizure.

"The Court: It is denied, even though I didn't hear it." (T. 323).

Appellant was convicted of criminal Possession of Stolen Property in the second degree on May 19, 1971, and sentenced to one year in jail. He appealed to the Supreme Court, Appellate Division. The conviction was affirmed without opinion on September 25, 1973.

Before the Appellate Division, appellant raised the issue of the attempted illegal entry of the officers. (Appellant's Brief to the Appellate Division, p. 45). The brief of the appellee argued, in part, that the Appellate Division should affirm because the record did not contain the alleged testimony of an illegal attempt to enter.

> "Appellant -- argues that the abandonment of the cartons was the result of an illegal attempt by the police to gain "forcible entry into the apartment" to seize the adding machines (brief, p. 45) and concludes that this allegedly illegally [sic] required suppression of the evidence. This claim is ... factually baseless." (Appellee's Brief on Appeal to the Appellate Division, p. 27).

Although appellee's brief recounts the facts of both hearing and trial, at no point does it reflect the testimony of both officers that the

door was "hit with force." Since the Appellate Division issued no opinion, no findings of fact or conclusions of law are available. Leave to appeal to the Court of Appeals of the State of New York was denied on December 18, 1973.

Appellant initiated this habeas corpus action while serving the one year sentence imposed by Judge Baker. The petition alleged a substantive violation of Fourth Amendment rights arising out of appellant's arrest.

The pertinent events surrounding this arrest began at approximately noon on March 9, 1970 when New York City Police Detectives Jacob and Schumacher of the Safe-Loft and Truck Squad positioned themselves on the north side of Houston Street at the Mott Street intersection. (M-22-23). They were waiting specifically for two men to arrive (M-22). The detectives were brought to that location by "information" that they had received. (M-4). There is no testimony as to the source or content of that "information" but it is clear that the officers had a physical description of two men, knew their apartment number, and believed that they were in possession of stolen property.

At about 5:00 p.m. the detective saw appellant and Eugene Bonica pull up in front of 302 Mott Street in a Volkswagon (VW) bus. (M-4). The detectives saw the defendants take three green and white cartons from the back of the bus. (M-5). Although the contents of the boxes were not known (M-26) the officers decided to investigate. They wished to find out what was in the boxes. (M-28) The officers then engaged in a pattern of activity calculated to either seduce or compel the defendants into permitting an examination of the interior of their apartment. The first approach was to

isolate the defendants in their apartment and gain entrance by concealing their identity. The defendants were thus followed as they carried the boxes into the apartment building -- appellant carrying two and Bonica carrying one. (M-6) The detectives did not stop them to inquire about the contents, but went directly to apartment No. 39. (M-6) The detectives went to that sixth floor apartment and knocked on the door. One of the defendants asked who was at the door. According to the testimony of Detective Schumacher, there was no answer until the door was opened. Then the police showed their badges. (M-59) After hearing the knock, appellant partially opened the door. But, not wanting to be harrassed, as soon as he saw the police officer's badges, he slammed the door shut.

The subterfuge having failed, the officers next attempted to enter by force. As appellant closed the door, the officers sought to force it open, (T.T. 87-8; 166-7) by pushing against it with their shoulders -- Schumacher calling to Jacobs to assist him in his attempt to enter forcibly.

When the detectives were unable to gain entry -- appellant out-pushed the officers and closed the door -- the officers resorted to their final, and successful strategem. They would isolate the defendants by sealing off all exits to the apartment, and compel them to open the door.

To accomplish this end, Detective Schumacher "pounded" on the door (M-59) to create the impression that the door would immediately be broken.

Detective Jacob then heard movement in the apartment and he went to a nearby hall window that opened onto a fire escape. He climbed onto the fire escape when he heard a window opening. (M-8-9).

Detective Schumacher stayed at the door of the apartment when

Detective Jacob went to the window. Detective Schumacher did go to the window (which opened onto the fire escape) after he also heard the sound of a window opening, (M-60) but he returned to the door. When Detective Schumacher returned to the apartment he, "Kept pounding on the door and demanded admittance." (M-56) He remained at the door until Det. Jacob returned many minutes later. Thus, the door and window were guarded so that nobody, "could use [them] to leave the apartment" (M-30; 63) and an officer was pounding on the door to be admitted. The defendants were not able to leave during this period.

While Detective Jacob was at the hall window (to stop anyone leaving) he saw three green and white boxes as they were being thrown from the apartment's window. (M-9) The detective did not know what was in the boxes at that time, but they appeared to be the same boxes which he had seen the defendants remove from the VW bus. (M-61; 10) Two of the boxes landed in the rear yard and one on the roof of a car in a nearby parking lot. (M-10) Detective Jacob went downstairs to retrieve the boxes. Detective Schumacher stayed at the apartment door and kept pounding, while Detective Jacob went downstairs. (M-11; 56)

When Detective Jacob returned with the boxes, Detective Schumacher was still at the door pounding. (M-58) The boxes were then placed in the hall and the detectives continued pounding and demanding to be admitted. Someone in the apartment asked if the detectives had a warrant and the detectives responded that they did not. (M-47-48) Appellant eventually opened the door and let the detectives in. He and Bonica were immediately placed under arrest. Detective Jacob advised them of their rights (M-49-50)

and questioned appellant. According to Detective Jacob, appellant then stated that the boxes had been thrown out of the window because, "They are the only things here that have serial numbers." (T-72) When Detective Jacobs testified at the Huntley Hearing (held during the trial), he was forced to admit that his memo book and arrest records contained no reference to this "admission". (T-74-76) The admission was vital to the People's case against appellant, in that it was used as proof that the defendant knew that the property had not been duly purchased. Beyond this admission the only evidence of theft was the absence of any record of sale by the Montgomery Ward Company which was shown to have possessed these machines at some time prior to March of 1970.

The Appellant's habeas corpus petition raised issues stemming from this arrest. The central issue was the improper admission into evidence of the boxes and the admission obtained from him by the arresting officers.

The federal action was assigned to Judge Ward. He denied the petition because he felt bound to by his interpretation of the criteria imposed upon the federal district court by the United States Supreme Court in Stone v. Powell 96 S. Ct. 3037 (1976):

> "...this Court would have no difficulty concluding that the state suppression hearing failed to adduce material facts. However, even assuming that the suppression hearing was not a full and fair fact hearing within the meaning of Townsend v. Sain, supra, It is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court. That is, it includes that corrective action available through the appellate process on direct review of the judgment of conviction." (Opinion of Ward, J. Thomas Pulver v. John Cunningham, 74 Civ. 2714, Sept. 21, 1976, pps. 8-9), hereinafter referred to as Opinion, p.).

Judge Ward then applied this standard to the instant case and found that the Appellate Division's affirmance without opinion reflected the fulfillment of a full and fair opportunity to litigate the Fourth Amendment claim (Opinion, p. 10).

Judge Ward, therefore denied the writ even though he found that

> "Petitioner's arguments [the Fourth Amendment claims] find support in the state record as a whole." [Opinion, p. 7]

POINT I - THE DISTRICT COURT WAS WRONG IN FINDING THAT AN OPPORTUNITY FOR A FULL AND FAIR HEARING WAS AFFORDED APPELLANT.

The writ of habeas corpus is a vehicle by which the federal courts of the United States can exercise a supervisory role over the protection of civil rights and liberties. By permitting individuals who have been deprived of their freedom to petition the federal courts to consider the constitutionality of the confinement, the courts are able to guarantee against a deprivation of freedom caused by an unconstitutional act.

The writ permits consideration of any constitutional violation that may be the basis of the confinement. The essence of the cause of action is to "...provided a mode for the redress of deprivations of due process of law." Fay v. Noia, 372 U.S. 381, 402 (1963). But an independent consideration of the propriety of the substantive legal determinations, upon which the confinement is based, is also a component of the federal court's sweeping powers in an action brought under the Great Writ.

> "It is district court judge's duty to apply the applicable federal law to the state court fact finding independently." Townsend v. Sain, 372 U.S. 293, 318 (1963); cf. Fay v. Noia, 372 U.S. 391 (1963)

To control the volume of litigation, the federal courts have severely restricted the extent to which they will reconsider the factual findings, and the fact finding processes, of the state courts. La Vallee v. Delle Rose, 410 U.S. 690 (1973), Townsend v. Sain, supra. The federal courts follow a policy of presuming that properly documented state court findings were arrived at through a proceeding which conformed to the basic requirements of due process, imposed by the Fifth and Fourteenth Amendments. (28 U.S.C. 2254(d)). The existence of proper findings, of course, does not by itself bar review, but rather imposes upon the applicant a burden of proving that the process of the litigation failed to conform with the constitutional due process requirements.

Although, the exact definintion of the types of defects in the state trial process that will require the federal court to review state conclusions of fact is elaborate, the underlying concept is simple. The federal courts review the state court trial process to discern a violation of due process, and,

> "whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embarrasses the concept of a fair trial." Frank v. Mangum , 237 U.S. 309, 346-7 (1923); cf. Brown v. Allen, 344 U.S. 443 (1953) (Holmes, J., dissenting)

This definitional concept of a fair trial, did not, however, provide sufficiently clear guidelines for screening the many habeas cases brought before the court. To avoid confusion, the Supreme Court undertook a precise definition. The Court articulated a six part analysis -- later incorporated into statute in 28 U.S.C. § 2254(d) in an eight part form. Townsend v. Sain, supra, p. 313. Fulfillment of each of these criteria is necessary for a finding that a state court hearing conformed to due process requirements. If it conformed, the Court described it as a "full and fair hearing." The integrity of the litigation process commands such a searching inquiry, because,

> "There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." Townsend v. Sain, supra, at p. 313-4.

Thus, a deprivation of liberty cannot constitutionally be permitted unless it is based upon a "full and fair hearing." The concept expresses our concern that the judicial process conforms to the requirements of the constitution. No scrutiny of the substantive merits of a constitutional claim (whether it is a deprivation of a right of counsel, a coerced confession or any other claim) can proceed until it is clear that the state court arrived at its factual

determinations through a procedure consistent with due process. The concern with the integrity of the judicial process is so great, that to guarantee against any abuse, complete federal relitigation of the facts of a dispute will be required:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing (4) there is a substantial allegation of newly discovered evidence (5) the material facts were not adequately developed at the state court hearing or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." Stone v. Powell, supra, at p. 313.

This breadth of the grounds that could impose such a burdensome duty upon the federal court as relitigation is but a reflection of the Court's concern for due process in the litigation.

The habeas court's review of the propriety of the legal decision of the state court may only be exercised after the court has found that the litigation process was full and fair.

The district courts considered both procedural and substantive violations in habeas litigation until

July 6, 1976. On that day the Supreme Court ruled that,

> "...where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim[36], a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."
>
> ...
>
> "36 cf. Townsend v. Sain, 372 U.S. 293 (1963)"
>
> Stone v. Powell, 96 S. Ct. 3037, 3052 (1976)

This decision curtails the district court's power to disagree with a state court on the application of the Fourth Amendment to a given set of facts. The power to review the substance of a Fourth Amendment claim was withdrawn. With reference to prior decisions of the Supreme Court, the following language in Townsend was specifically rendered inapplicable to Fourth Amendment cases:

> "The district court judge...may not defer to its [the state court's] findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."
> Townsend v. Sain, supra at p. 318.

Stone does not, however, terminate all consideration of Fourth Amendment claims. The Court repeatedly states that

a claim is barred only if, "...the State has provided an opportunity for a full and fair litigation of the Fourth Amendment claim...." Stone v. Powell, supra, at p. 3052. The Court's rationale for restricting jurisdiction is the futility of attempting to deter law enforcement activities by judicial decisions in collateral actions which follow by many years the official misconduct. The cost of freeing a guilty man was held to exceed the value of so belated a slap upon the officer's wrist. Stone v. Powell, supra at p. 3050-1.

The Court had the option of terminating all collateral review of Fourth Amendment decisions. The articulated policy basis would permit such a result, since absence of any significant deterrent effect of a habeas decision to suppress is a factor in all such cases. Whether or not the appellant had an opportunity for a full and fair hearing, the impact upon the constable is the same. But the Court identified this full and fair hearing factor as a matter so significant that, once proven, the district court must consider a Fourth Amendment claim, despite the futility of such an exercise as a method of deterring excessive police conduct.

The explanation for this unexplained refusal to extend clearly articulated policy to its logical conclusion

is the extent to which a violation of the full and fair hearing concept tramples our most fundamental principles. The factors that led the Supreme Court to impose the burden of relitigation upon a habeas court, when a full and fair hearing was not provided by the state, reflect a policy so basic that the practical considerations of Stone were deemed of lesser importance. Despite the lack of practical impact upon the police, no man can be imprisoned when the judicial process itself was constitutionally inadequate.

The Court was willing to yield to the State courts the task of applying the law of the Fourth Amendment. Stone v. Powell, supra, at p. 3015, note 35. Even when they are substantively wrong, the Court will grant the final decision to states, subject only to federal review by the Supreme Court on direct appeal. When the state court violated the dire process rights of the appellant, however, the federal court's obligation to review was maintained.

The Stone Court used the phrase "opportunity for a full and fair hearing" to designate the type of due process violation that would trigger federal scrutiny. It is not exactly the same phrase as that used in Townsend. Despite the variance in language, the Stone Court's dependence upon Townsend for definition of this concept is

made clear by the annotation to Townsend immediately following the "opportunity for a full and fair hearing" phrase. Stone v. Powell, supra, at p. 3052, note 36.

The concept is not defined in any other way. However, some assistance in defining this concept can be gained from the reference in Stone to the concurring opinion of Justice Powell, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). What is apparently the identical concept is there described as, " a fair opportunity to raise and have adjudicated the question." Stone v. Powell, supra, at p. 3045.

The reason for searching so carefully for guides to the interpretation of the phrase is that the reference to an "opportunity" for a hearing, seems to reject an actual requirement that the state hearing be full and fair. The opportunity for such is sufficient.

But an "opportunity"could be perceived in many ways. One possibility, is that it is the "opportunity to be heard." Thus, the fact that a judge, with authority to grant the motion, listened to an argument, or accepted motion papers, might be deemed a sufficient opportunity. If such interpretation were adopted, no matter how inadequate the judicial process by which a motion was decided, the habeas court could not intervene. Baseless factual findings would suffice. Even the failure to decide the claim, on its merits, if argument

were allowed, might be an "opportunity." Such cannot be. The reference in Schneckloth to an "opportunity to raise and have adjudicated" and the reference in Stone to a "full and fair hearing" reveal an intent to impose some standard upon the state court adjudicatory process.

The minimum standard that could be meant by the language "and have adjudicated" is a requirement that the defendant's claim be decided on its merits. Similarly, the reference to Townsend, that is inescapably created by the use of the "full and fair hearing" verbiage, necessarily involves a requirement that any opportunity to argue be followed by a decision on the merits.

> "There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." [emphasis added] Townsend v. Sain, supra at p. 313-4

Certainly, the Stone Court would not have perpetuated any habeas review of Fourth Amendment actions if it did not at least mean to require this semblance of a fair hearing. A decision on the merits is also the first of the six factor test of Townsend. The due process policy that motivated the Court to retain Fourth Amendment review cannot be satisfied if a state hears, but fails to decide on their merits, constitutional claims.

In imposing a requirement that a habeas petitioner may not gain federal review of these claims unless the opportunity for a full and fair hearing has been denied, the Stone Court imposed a burden of proof upon the petitioner. He must affirmatively demonstrate that the merits of his claim were not decided by the state court. He must make such a"showing [of denial] at trial and on direct review." Stone v. Powell, supra, at p. 3052, note 37.

Appellant Pulver, herein, has met this burden. The District Court essentially found that the trial level determinations did not provide appellant an "opportunity" to litigate within the meaning of Stone (Opinion, p. 8-9). The District Court denied the writ solely upon the finding that,

> "...the record discloses no such inadequacy in the appellate process. ...inasmuch as all the material facts were before the state appellate courts on direct review and this Court can find no basis for concluding that the appellate process was otherwise deficient, petitioner has had a full and fair opportunity to litigate his Fourth Amendment claims." (Opinion, at p. 10)

In so finding the District Court necessarily decided that an affirmance without opinion constitutes an opportunity for a full and fair hearing. A federal habeas petitioner can

gain review if he shows that the state court did not decide the claim on its merits. In this case the lower court process was defective in that the merits of the factual dispute--first raised by the police detectives' testimony at the trial--were never decided. Since there was no decision in the Appellate Division, the mere fact that the matter was argued by appellant does not mean that the Court decided the factual claim on its merits.

> "...[I]f no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits." Townsend v. Sain, supra, at p. 34

In reconstructing the findings of the Appellate Division to determine whether the factual issue was decided, the first resource is the briefs of the parties. If the factual allegations of appellant were not responded to by allegations of the appellee, it is unlikely that an affirmance without opinion reflects a determination of an unresolved factual conflict. A court must be alerted to an issue before it can decide it.

In this case, the factual issue stems from

uncontradicted testimony of two police detectives, elicited in response to questions by the prosecutor. Appellant briefed these facts. Appellee--the State of New York -- did not brief those facts, nor admit that such testimony was adduced at trial. At no point in its brief do the People reveal that these uncontradicted words were uttered. In fact, its brief reviews both trial and hearing testimony and in its recitation of the facts leaves out this testimony. With an issue so oddly framed it is more likely than not that the Appellate Division never perceived the new issue created by the change in testimony at the trial. Since the People did not admit that there was any new issue, and since the trial court did not decide it, a review of the record reveals a substantial likelihood that the claim was never decided. The appellant has therefore met his burden of proof. Reconstruction by reference to the facts also indicates a failure to perceive this factual issue. When a key fact is uncontested; no court could conceivable have noted it without recognizing the change it made in the legal issues. Totally different legal issues command resolution in an opinion. The Appellate Division followed the People's allegations of fact and therefore failed to resolve the issue herein presented.

The District Court was wrong in finding that appellant had failed to show that he was denied an opportunity for a full and fair hearing.

POINT II - EVIDENCE ADMITTED ACAINST APPELLANT AT HIS STATE COURT TRIAL WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE AN ILLEGAL ACT INDUCING THE ABANDONMENT OF PROPERTY PRECLUDES ITS SEIZURE WITHOUT PROBABLE CAUSE.

No contraband seized by an unconstitutional act of a law enforcement officer may be introduced into evidence. Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963). The lawfulness of the acts that lead to the seizure must be determined by comparing the officials' conduct with the requirements of the Fourth Amendment. The Amendment 's protection against "unreasonable searches and seizures" guarantees each of us freedom from harassment in our homes by tyrannical officials. Unless these officials follow the procedures that have been developed to make meaningful the cryptic verbiage of the constitution, they may not breach the privacy of our homes. Unless an officer has probable cause to arrest--and in many circumstances not even then--he may not break down the door of one's home. If he does forcibly enter a home without probable cause, any tangible items seized must be suppressed. United States ex rel Manduchi v. Tracy, 350 F.2d 628 (3rd Cir.).

In an unbroken line of authority extending back for 20 years the courts have held that an attempt to break into a home illegally will also cause the suppression of any contra-

band seized as a result of that illegal act. United States v. Hobson, 226 F.2d 890 (8th Cir. 1955); Lawrence v. Henderson, 478 F.2d 709 (DC Cir. 1973). The particular issue presented in this writ is this constitutional ramification of an unsuccessful attempt to force open appellant's door. The forcible impact by Detective Schumacher (T.88) on the petitioner's door did not rend the hinges. The force used by Detective Jacobs did not prevent appellant from reclosing his door. But the illegal display of force did have a consequence. The petitioner, certain that the police officers would perservere until they got into the apartment, tossed the three boxes containing adding machines out of the window. That this act was motivated by his belief that the officers would eventually search the apartment is clearly revealed in his response to a query as to why he threw out the boxes:

> "They are the only things here that have serial numbers." (T.72)

Knowing that the police would enter the apartment -- although they had no legal right to do so, he threw out the contraband.

These boxes were not suppressed because the state court judge at the suppression hearing found that they were abandoned. (M-92) He did not know of the attempted forcible entry since the officers did not admit that act until the trial.

The proof of this fact entirely changes the legality

of the seizure. An illegal act which induces an abandonment, taints that abandonment and renders it involuntary. United States v. Hobson, 226 F.2d 890 (8 Cir. 1955); United States v. Watson, 189 F.S. 776 (SD Calif, 1960); United States v. Merritt, 293 F.2d 742 (3 Cir, 1961); Fletcher v. Wainwright, 399 F.2d 62 (5 Cir, 1968); Commonwealth v. Painter, 368 F.2d 142 (1 Cir., 1966); Lawrence v. Henderson, 478 F.2d 705 (DC Cir., 1973); United States v. Newman, 490 F.2d 993 (10 Cir., 1974); People v. Loria, 10 N.Y.2d 372, 223 N.Y.S. 2d 462 (1961); People v. Williams, 265 N.Y.S. 2d 46 (S. Ct. App. Div., 1965); People v. Baldwin, 25 N.Y.2d 70, 302 N.Y.S. 2d 571 (1969).

This well-established principle has been enshrined in our constitutional law in a sequence of decisions in both federal and New York courts beginning with the often cited decision of the Eighth Circuit in United States v. Hobson, supra.

Hobson involved a police officer who delayed making an arrest until he found the subject in a house that he apparently wanted to search. The illegality was the delay for 30 days in making the arrest and the failure to obtain a search warrant, 226 F.2d at 891; 894. The reason for the suppression of contraband that was thrown out of a window when the officers banged on the door was that the prohibition

against unreasonable searches would be meaningless if a ruse could be used to achieve the illegal entry.

The visualization of the police conduct as a ruse to evade constitutional protections is most clearly expressed in United States v. Watson, supra. In that case the same agent as in Hobson once again delayed effecting an arrest until his subject entered a suspect premises. This illegality tainted the subsequent voluntary production of the contraband.

> "...even though there was no search of the apartment prior to the arrest of Watson, and even though the marijuana offered in evidence was given voluntarily to the officers, the evidence is tainted to such an extent by the illegality of the entry." 189 F. Supp. at 781

In Fletcher v. Wainwright, supra, the illegality was the officers' knocking upon a motel door until it broke, without probable cause. Stolen jewelry was found outside of the rear window of the room. The jewelry was suppressed.

> "Several courts have considered this situation and have uniformly held that the initial illegality tainted the seizure of the evidence since the throwing was the consequence of the illegal entry." 399 F.2d at 64.

The court held that to "...hold otherwise would abort the deterrent policy behind the exclusionary rule (at 65).

Neither the variety of the official conduct violative of the Fourth Amendment nor the ingenuity of the defendant's

in secreting the contraband has been held relevant to the admissiblity of the items seized. Once the seizure has been tainted, the items revealed by that taint must be suppressed.

In Lawrence v. Henderson, supra, the defendant was illegally arrested for vagrancy. He hid narcotics paraphenalia in the police car. The court held that since,

> "... the illegal arrest prompted him to conceal it in the police vehicle. Under such circumstances it cannot be said that Lawrence voluntarily abandoned the "outfit". 478 F.2d at 708.

An even more unusual factual setting for an abandonment than the police car in Lawrence, was the very middle of the highway as used by Newman. In United States v. Newman, supra, officers properly stopped a camper type truck approximately 700 miles from the border. But the initially valid brief detention to investigate the driver's documents was transformed into an illegal detention and an illegal attempted search when the officers demanded to both enter the back of the camper and have a locked trunk opened. The driver was permitted to reenter the cab of the camper to get the keys to the trunk. He took that opportunity to speed off. However, he accelerated so rapidly that the trunk slid from the camper onto the highway pavement. Drugs were eventually found in the trunk. The court held that:

> "Everything was triggered by the

> original illegal intrusion and the contraband evidence was thus inadmissible as the fruit of the poisoned tree." 490 F.2d at 995.

This rule of law was adopted by the New York State Court of Appeals prior to the trial of petitioner's case.

In People v. Loria, supra, the officers forced the defendant's wife to open the house door by kicking it to permit the police to enter, supposedly for a "talk." The defendant, in fear of a search, then threw a vanity case from the window. Citing United States v. Hobson, supra, the contraband was suppressed.

And just a few months before petitioner's trial, the Court of Appeals in People v. Baldwin, supra, in which the defendant after being illegally arrested, dropped a drug saturated paper, held, that:

> "...even if the facts would warrant a finding of an abandonment, there could be no abandonment as a matter of law if the defendant had been unlawfully arrested in the first instance." 302 N.Y.S. 2d at 574.

There has been no decision in which an illegal act by a law officer which induced an abandonment of contraband has been excused. In every case the evidence has been suppressed!

There is one type of situation in which the evidence will not be suppressed, however. If police conduct inducing an abandonment was lawful, there will be no suppression.

In Kleinbart v. U.S., 439 F.2d 511(DC Cir, 1970) for instance, officers possessing probable cause to arrest a defendant went to his apartment. With one man stationed across from the rear window, an officer simply knocked on the door. This lawful conduct induced Kleinbart to place a bottle of narcotics on the window-ledge. The bottle was admitted.

Similarly, in United States v. Preston, 463 F.2d 544 (7 Cir, 1972) cert. den. 93 S. Ct. 209 (1972), a counterfeit bill hidden in a police car was admitted bacause the officers acted legally in aid of the defendant when they asked him to sit in the police car while they questioned a gas station attendant who had been threatening him with a base-ball bat. The officers then found that the attendant had been given another counterfeit bill by the man on the previous day. Preston was arrested and searched. The court found that the bill was hidden prior to this arrest, while Preston sat in the car for his own safety.

The decisions in Preston and Kleinbart are consistent with the policy derived from Hobson. Before contraband will be suppressed, there must be evidence of illegal police conduct. There was none in either of these cases.

Once there is such evidence, neither the place of abandonment nor the nature of the illegality can remove the

taint. Thus, in the post Preston and Kleinbart decision, -- Lawrence v. Henderson -- the D.C. Circuit suppressed contraband that was hidden in a police car, while in another recent case (Newman) the Tenth Circuit suppressed contraband left on the highway.

Petitioner herein was induced to act by clearly illegal police conduct. Nothing in the view of appellant walking down the street, or in his entrance into his building could yield to even a suspicion of criminal conduct. When appellant opened his door and then closed it upon the officers, that conduct in no way can be considered sufficient to create probable cause.

On this last point a decision of the highest court of Pennsylvania is of interest. The defendant in Commonwealth v. Jeffries, 311 A.2d 914 (S. Ct. Pa., 1933) ran away from police officers. The court specifically held that this flight was not evidence of criminality otherwise, "everyone who didn't want to talk to policemen could be arrested." Appellant's act of closing his door was an act that was constitutionally protected. There was no lawful basis by which the officers could compel him to talk to them. Once he opened the door, he waived no rights. He was as free to close it as he would have been to demand a warrant before opening it originally.

The pre-trial hearing judge (Helman) spoke loosely in his oral opinion of:

> "...a denial to the officers of a right to enter the premises when they just knocked on the door." (T.92)

There can be little reason to doubt that this language was not seriously meant. The officers had no right to "enter" because they did not have any reasonable basis upon which to suspect the commission of a crime. Indeed the essence of the protection provided by the Fourth Amendment is that officers have no right to enter a man's home unless they first acquire a sufficent basis in fact to prove that their demanded access is "reasonable." Mapp v. Ohio, 367 U.S. 643 (1961).

But the officers herein did not acquiesce to Appellant's non-verbal claim of his Fourth Amendment rights. When he tried to close the door, they tried to stop him by force. (T.87-8)

> "Schumacher hit the door trying to open it again, and he called me to help him. He hit it with force, and by the time I hit the door, it was already closed,..."

The regret in Detective Jacobs' voice can almost be perceived from the transcript. If he had only been a bit quicker, instead of ignobly pounding his shoulder into the locked tenement door, he might have been able to smash it back into appellant's face.

What lawful basis did either officer have to "hit"

the closing door "with force"? None. Can it be doubted that the consequence of this illegal attempt to break into the apartment was the direct cause of appellant's throwing away of the boxes? Again the answer is no.

Once these two propositions are established, then the legal conclusion is compelled by every decision from Hobson and Baldwin to Newman. Evidence discovered because of an abandonment which is induced by the illegal conduct of the officers must be suppressed.

The unconstitutional activities that causes the officers to enter appellant's apartment taint the admissibility of this statement, as well as the admissibility of items seized.

In Brown v. Illinois, 95 S. Ct. 2254 (1975) the Supreme Court considered this problem. The Court held that Fourth Amendment violations, which are the direct cause of an incriminating statement, taint the acquisitions of that statement and render it inadmissible. In Brown v. Illinois, warnings required by Miranda v. Arizona, 384 U.S. 436 (1966) had been given to the defendant after the Fourth Amendment violations and prior to the statement. The Miranda warnings were held to have had no curative effect. They did not remove the taint (95 S. Ct. at 2261). Citing Wong Sun v. United States , 371 U.S. 471 (1962) the Court held that:

> "...even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains...Wong Sun requires not merely that the statement meet Fifth Amendment standards of voluntariness but that it be 'sufficiently an act of free will to purge the privacy taint!!...
>
> "The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case." (95 S. Ct. at 2261)

The statement herein must be suppressed. It was made immediately after the depredation. It is the product of the officers' illegal attempt to forcibly enter appellant's apartment.

POINT III - EVIDENCE ADMITTED AGAINST APPELLANT AT HIS STATE COURT TRIAL WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AS THE PRODUCT OF AN ILLEGAL ARREST.

The constitutionality of every arrest is controlled by the dictates of the Fourth Amendment. Its coverage extends to arrests whether they are made by state or federal officials, with or without a warrant. Mapp v. Ohio, 367 U.S. 643 (1961); Taylor v. State of Arizona, 471 F.2d 848 (9th Cir, 1972) cert. den. 409 U.S. 1130 (1972). The controlling law is the law of the state, unless it is violative of the Fourth Amendment. No arrest may be made unless the arresting officers have justified the intrusion upon an individual's freedom by ascertaining facts sufficient (probable cause) for them to believe that the arrest is necessary.

The briefest review of judicial decisions in this area will reveal the enormity of the problem created by the requirement of applying the concise phraseology of the Fourth Amendment to the activity of law enforcement officers. Not only has an analysis of the exact informational base sufficient to justify an arrest proven elusive, but the varied degrees of restraint of liberty have even made the description of an arrest difficult.

For the purposes of this action the vagaries of probable cause are not in issue. The officers who appeared at appellant's door did not have probable cause to arrest or search. All that they knew of appellant was his place of residence, his description, some unrevealed and presumably "unreliable" information that he was violating the law, and the vision of him and his friend Mr. Bonica walking from their car to their apartment with a few boxes. Nothing in this information comes close to probable cause to believe that a crime was being committed. See: Adams v. Williams, 407 U.S. 143 (1971); United States v. Gonzalez, 362 F. Supp., 415, 421 (SDNY, 1973); People v. Calder, 44 A.D.2d 683, 353 N.Y.S. 2d 808 (1974); Reliance on New York Law CPL Section 140.10 would not change the legal significance of tne officers' failure to meet the probable cause standard. Sams v. NYS Board of Parole, 352 F. Supp. 296, (SDNY 1972); United States ex rel Gonzales v. Follette, 397 F.2d 232 (2d Cir., 1968) under the then applicable law, Section 177; United States v. DiRe, 332 U.S. 581 (1948); United States ex rel Eidemnuller v. Fay 240 F. Supp. 591 (SDNY, 1965).

The arrest issue raised by this petition centers upon the determination of exactly when, in the hectic events preceding the officer's handcuffing of appellant, he was arrested. It is petitioner's claim that he was arrested at the moment that detectives Jacob and Schumacher attempted

to force open his door with their shoulders. From that moment to their eventual intrusions into his apartment, the actions of the officers reveal that appellant and Bonica both believed that they were, and were in fact, continuously in restraint in that the officers were preventing them from leaving while persistently attempting to enter. (M-30, 56, 59)

The restriction constitutes an arrest and it occurred prior to any viewing of boxes flying from windows or of adding machines in parking lots. It occurred when the officers had no articulable basis upon which to justify their belief that a crime was being committed. It occurred in violation of the constitution since it was not based upon probable cause.

The issue of the exact point in a sequence of events at which police activity constitutes an arrest has provoked substantial litigation. The judicial thinking in both federal and state courts has concentrated upon the formulation of guidelines by which the events can be scrutinized, and the identification of the basic principles upon which the analysis should proceed.

The first premise is that the determination of the the timing of an event can only be made by examining both the

actual restriction and the perception of the parties as to the defendant's freedom to leave. Beck v. Ohio, 379 U.S. 89 (1964) An arrest is an exercise of power by law officers. The loss of freedom rather than the recitation of magic words ("you are under arrest") or the laying on of handcuffs is the determining factor. United States v. See, 505 F.2d 845 (9 Cir., 1974); Kelley v. United States, 298 F.2d 310 (DC Cir, 1961); United States v. Thomas, 250 F. Supp. 771 (SDNY, 1966) aff'd 396 F.2d 318 (2 Cir, 1969). An arrest can occur without any

> "...application of actual force or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of an arrest. IT IS SUFFICIENT IF THE PERSON ARRESTED UNDERSTANDS THAT HE IS IN THE POWER OF THE ONE ARRESTING...." Coleman v. U.S., 295 F.2d 555, 563 (DC Cir, 1961)

The focus in analyzing a sequence of events which culminate in an arrest is on the restriction of freedom to leave. An arrest has been held to have occurred long before all movement has been impeded by "manual touching." Such a conclusion is compelled because the loss of freedom is substantial when the subject cannot leave, and reasonably believes that he cannot. United States v. Hosletter, 298 F. Supp. 1312 (D. Del. 1969). That substantial loss is the

loss that is protected by the Fourth Amendment. Total control if the standard -- to be proven by a manual touching or physical presence within arms reach -- would defer constitutional protections and permit vast encroachments upon personal liberty. It would also grant to the police the option of controlling constitutional protections by walking a few feet away from a subject and declinging to say "you are under arrest."

To prevent such a distortion of constitutional principles the courts have looked to the facts of each case and have analyzed them to discern whether the suspect's freedom was restricted. By this process, an arrest has even been held to have occurred when officers restricted a subject's freedom to leave by blocking the further progress of his car.

> "Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized." People v. Cantor, 36 N.Y.2d 106, 111 365 N.Y.S. 2d 509, 515 (1975) (Emphasis Added)

The defendant was deemed under arrest even though his activities were not controlled by the officers.

The focus is so completely upon the restraint of one's freedom to leave that the court in Yam Sank Kwai v. INS, 411 F.2d 683 (DC cir, 1969) strongly suggested that, in

certain circumstances, subjects inside of building that was surrounded by the police could be under arrest.

> "...[T]he Supreme Court has verbally circumscribed the outer limits of 'seizure' under the Fourth Amendment to mean an accosting of an individual and a restraint of his liberty to depart." 411 F.2d at 686.

In that case, the reason that an arrest was not held to have occurred was that those inside of the building did not know of the police presence and that many of them, in fact, would not have been restrained by the police if they had tried to leave.

> "We take this to mean that a 'seizure' must be personal, not general; that it must contain the element of awareness on the part of both the protagonist and the antagonist; and it must restrain the liberty of the individual to the extent that he is not free to leave...There can be no seizure where the subject is unaware that he is "seized". id at 686.

Thus, if those within the building had known that the agents had, "...restrain[ed] their liberty...to the extent that they [were] not free to leave," [411 F.2d at 686] the Court would clearly have held that the people in this encircled building were under arrest.

Since freedom of movement is the focus of the Fourth Amendment's protection against seizures of the person,

total control over the arrestee is not needed for an arrest to have occurred.

> "...when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [or alien] a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 (1967). (Emphasis Added)

The restraint considered in Terry was, of course, simply the verbal order of the officer to stop. The Court held that such a limitation on one's freedom of movement -- to stop for a moment or two -- was a seizure within the meaning of the Fourth Amendment. Compulsory stopping restrains only the freedom to walk away. A suspect's constitutional rights protect him from such restraint even if he is not touched or searched. He would be deemed 'seized' even if the officer has given him the order from a block away. The removal of the right to freely leave the area in which the officer has detained the person is the invasion of Fourth Amendment rights.

Appellant herein was clearly restrained. Detective Jacobs went onto the fire escape to stop petitioner in case he "...used[d] the fire escape to leave the apartment." (M-30) At the same time Detective Schumacher watched the door. (M-20) Thus, both exits to the apartment were guarded to prevent appellant from leaving. The appellant

was not free to leave.

All elements considered necessary for a finding of an arrest were thus satisfied. Appellant knew of the officers' presence at the door. He had seen him and their badges. He knew that they were intent upon detaining him -- they had even tried to forcibly enter (T. 82-8). He knew of Schumacher's continued presence because Schumacher, "...kept pounding on the door and demand[ing] admittance." (M-56) He knew that he was not free to leave. His statement to the officers reflects this knowledge. Appellant knew that the officers would not leave, and that he would not be allowed to leave, until they had entered. Therefore, he threw away, "...the only things here that have serial numbers." (T. 72)

The mutual understanding that appellant's freedom to leave had been removed, combined with the officers' admission that they were in fact preventing him from leaving are facts that establish an arrest as defined in Beck v. Ohio, supra; Coleman v. U.S., supra; Kelly v. U.S., supra, and United States v. Thomas, supra. By searching the apartment and pounding repeatedly upon the door, the officers, in this case, arrested petitioner.

The arrest was complete before Detective Jacobs went to the fire escape. It occurred before the officers saw any boxes being dropped from any windows. It occurred prior to the officers' possession of probable cause.

The illegal arrest of appellant taints the subse-

quently obtained property. Both the admission and the boxes must be suppressed as products of an illegal arrest. Brown v. Illinois, 95 S. Ct. 2254 (1975); Wong Sun v. U. S., 471 (1963).

Since appellant was under arrest when he dropped the boxes from the window, the act cannot be deemed voluntary. United States v. Katz, 389 U.S. 347 (1967); United States v. Fay, 239 F. Supp. 132 (SDMY, 1965); People v. Zimmer, 329 NYS 2d 17, aff'd 339 [NYS 2d 671 (App. Div. 1972)]. It was no more voluntary than in the emptying of one's pockets at the police station. Either act would, in this case, be the product of an illegal arrest and must be suppressed.

CONCLUSION

THE DISTRICT COURT WAS WRONG IN DENYING THE WRIT, APPELLANT WAS NOT PROVIDED AN OPPORTUNITY FOR A FULL AND FAIR HEARING AND ITEMS ILLEGALLY SEIZED WERE THEREFORE ADMITTED INTO EVIDENCE AGAINST HIM. THE CONVICTION MUST BE REVERSED AND A NEW TRIAL ORDERED.

Dated: Hempstead, New York
November 22, 1976

Respectfully submitted,

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